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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE JUAN VALDOVINOS,

Defendant and Appellant.

E047718

(Super.Ct.No. INF51776)

OPINION

APPEAL from the Superior Court of Riverside County. Richard A. Erwood,
Judge. Affirmed with directions.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting and
Meredith A. Strong, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Jose Juan Valdovinos of first degree murder (count 1—Pen. Code § 187, subd. (a))¹ and found true an allegation that he personally and intentionally discharged a firearm proximately causing the victim’s death (§§ 12022.53, subd. (d), 1192.7, subd. (c)(8).) The trial court sentenced defendant to imprisonment for 50 years to life. On appeal, defendant contends the trial court committed reversible error in instructing the jury with an unmodified version of CALCRIM No. 522 because, as given, the instruction failed to adequately inform the jury that it could find defendant guilty of the lesser charge of second degree murder if it found defendant was provoked. Defendant also requests that we direct the trial court to make clerical corrections to the sentencing minute order and abstract of judgment. We shall order the requested corrections. In all other respects, we affirm the judgment in full.

FACTUAL AND PROCEDURAL HISTORY

On August 25, 2005, Baldemar Rodriguez woke up to find the victim waiting for him; the two occasionally worked together and lived next door to one another. Defendant arrived in a black truck and left shortly thereafter. Rodriguez and the victim then left together around 9:00 a.m. They went to defendant’s apartment. The victim got out of the car and went into defendant’s apartment while Rodriguez waited in his vehicle.

The victim and defendant left together in defendant’s black truck. Rodriguez waited in his vehicle for the victim to return. Approximately one hour later, defendant returned without the victim. He informed Rodriguez that the victim would not be

¹ All further statutory references are to the Penal Code unless otherwise indicated.

returning. Defendant told Rodriguez he should leave. Rodriguez left for work, but spoke with defendant on the phone later that day. Defendant told Rodriguez not to tell anyone that he saw defendant and the victim together that day.

On the same morning, Armando Magana and his nephew were surveying the former's undeveloped property in Desert Hot Springs. At some point they heard between four and six successive gunshots. They saw a black truck drive away quickly thereafter. Later, they found a body lying in the middle of the road. They called the police.

The first officer arrived at the scene at approximately 11:20 a.m. He checked the victim for signs of life, but did not find any. The officer noted obvious gunshot wounds; two to the victim's head and several to his back. Officers observed three expended .22-caliber shell casings lying next to the body. However, due to a sudden downpour, only one of the shell casings was recovered from the scene. The victim was clutching a piece of a paper in his hand on which was written a name and phone number. That information eventually led investigators to defendant's girlfriend, Elvira Landeros.

An autopsy of the victim revealed six wounds from five separate gunshots; two to his head, one to his upper back/neck, and two to his central and lower back. All the entry wounds were to the back of the victim's body. The victim died from multiple gunshot wounds.

Landeros, with whom defendant lived at the time, testified that she owned a black 2005 Nissan Frontier truck, which defendant sometimes drove. She awoke the morning of the killing to find both her and defendant's vehicles gone. Defendant came home, told her something had happened, and that they had to pack up and leave. Defendant told her

that “they” had stolen his truck. They packed as much of their belongings in her truck as they could and left. At some point, she noticed that there were bullets in the truck’s cup holder. She asked defendant about them. He told her he had a gun in the truck. She told him to get rid of it.

Defendant stopped in a “desert” area, picked up the bullets, and took a white plastic grocery bag out to the end of the street. He returned without the bag; defendant told her he had buried the gun. They drove to a motel where they checked in. While watching the news in the motel room, they witnessed a story about a person found dead. Defendant told her the decedent was the man who stole his truck. Defendant said he shot the man. He told Landeros not to tell anyone; anyone who inquired should be told that defendant had dropped the victim off at a store.

Defendant purchased a prepaid cell phone so that his calls could not be traced. They drove to Las Vegas where they stayed for one night. The next day they drove to Colorado where they stayed with her brother for a couple of nights. Thereafter they went to her parents’ home in Texas. Police tracked the truck to her parents’ home.

Landeros returned to California with an investigator; she showed him where defendant disposed of the gun. The investigator found a Ruger .22-caliber pistol buried in a white grocery bag with five Federal .22-caliber rounds. A criminalist test fired the recovered pistol and compared the expended shell casings to the one found at the crime scene; they matched.

DISCUSSION

A. JURY INSTRUCTION

Defendant maintains that the court's instruction of the jury with CALCRIM No. 522 failed to adequately explain that provocation insufficient to establish manslaughter may, nonetheless, negate premeditation such that the jury could find defendant guilty of second degree, rather than first degree murder.

What would otherwise be deliberate and premeditated first degree murder may be mitigated to second degree murder if the jury finds that the defendant "formed the intent to kill as a direct response to . . . provocation and . . . acted immediately," i.e., without deliberation or premeditation. (*People v. Wickersham* (1982) 32 Cal.3d 307, 329, disapproved on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 200-201.) Provocation sufficient to mitigate a murder to second degree murder requires only a finding that the defendant's subjective mental state was such that he did not deliberate and premeditate before deciding to kill. (*People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1295-1296 (*Fitzpatrick*); *People v. Padilla* (2002) 103 Cal.App.4th 675, 677-678.) Thus, a defendant who is subjectively prevented from deliberating because of provocation is guilty of second degree rather than first degree murder, even if a reasonable person would not have been so precluded. (*Fitzpatrick*, at pp. 1294-1296.)

In contrast, provocation sufficient to reduce murder to voluntary manslaughter requires not only that the defendant subjectively experienced a heat of passion resulting from the provocation but also that the response was objectively reasonable, i.e., that a person of average disposition would have been provoked to commit homicide in the same

situation. (*Fitzpatrick, supra*, 2 Cal.App.4th at pp. 1294-1296; *People v. Lasko* (2000) 23 Cal.4th 101, 108.) Defendant contends that CALCRIM No. 522 fails to make this distinction clear. He notes that there was evidence adduced at trial that defendant acted out of provocation, rather than with deliberation and premeditation. Landeros testified that defendant told her the victim had made fun of him, said that he could not do anything about the items the victim had stolen from him, and called him a coward. Defendant told her he was scared of the victim; that the victim could be dangerous to her and her son. Thus, despite evidence of provocation, defendant maintains that the alleged instructional error effectively left jurors with only a choice between convicting him of first degree murder or voluntary manslaughter, and eliminated any possibility that jurors would convict him of second degree murder.

“In reviewing a challenge to jury instructions, we must consider the instructions as a whole. [Citation.] We assume that the jurors are capable of understanding and correlating all the instructions which are given to them. [Citation.]” (*Fitzpatrick, supra*, 2 Cal.App.4th at p. 1294.) As given in this case, CALCRIM Nos. 521 and 522, taken together, adequately explain that provocation can mitigate first degree murder to second degree murder.

CALCRIM No. 521 reads that a verdict of first degree murder requires a finding of deliberation and premeditation, and that “[a]ll other murders are of the second degree.” It reads that in order to determine that the defendant premeditated and deliberated, the jury must find that the defendant “carefully weighed the considerations for and against [his] choice and, knowing the consequences, decided to kill.” It explains that “[a]

decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated.” CALCRIM No. 522 provides: “Provocation may reduce a murder from first degree to second degree and may reduce a murder to manslaughter. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. Also, consider the provocation in deciding whether the defendant committed murder or manslaughter.” Thus, the instructions clearly informed the jury that it could not convict defendant of first degree murder if it found that his decision to kill was made “rashly, impulsively, or without careful consideration” and that it could consider provocation in deciding whether the crime was first or second degree murder. And, CALCRIM No. 521, as given in this case, distinguished between first and second degree murder on the basis of premeditation and deliberation. Taken together, these instructions adequately informed the jury that if it found that defendant acted rashly or impulsively as a result of provocation, and that he did not deliberate and premeditate, then the jury could conclude on that basis that the crime was second degree murder rather than first degree murder.

Defendant contends that the instructions do not adequately convey the idea that provocation can prevent a defendant from premeditating and deliberating because, unlike CALJIC No. 8.73, CALCRIM No. 522 fails to make that idea explicit. Likewise, he contends the instruction fails to “make clear that evidence of provocation that is insufficient to reduce the crime from first degree murder to manslaughter may nevertheless be sufficient to reduce the crime to second degree murder.” Nonetheless,

CALCRIM No. 522, does state that “[p]rovocation may reduce a murder from first degree to second degree”; thus, it adequately conveys the basic legal principle.

In *People v. Rogers* (2006) 39 Cal.4th 826 (*Rogers*), the California Supreme Court addressed a similar contention concerning CALJIC No. 8.73. CALJIC No. 8.73 provided, “If the evidence establishes that there was provocation which played a part in inducing an unlawful killing of a human being, but the provocation was not sufficient to reduce the homicide to manslaughter, you should consider the provocation for the bearing it may have on whether the defendant killed with or without deliberation and premeditation.” In response to criticism that CALJIC No. 8.73 failed to provide a sufficient explanation of the relationship between provocation and second degree murder, the California Supreme Court held that CALJIC No. 8.73 is a pinpoint instruction, i.e., one which relates particular facts to the charged crime. (*Rogers*, at pp. 878-880; see also *People v. Mayfield* (1997) 14 Cal.4th 668, 778-779.) It noted that its previous decision in *People v. Wickersham*, *supra*, 32 Cal.3d 307, did not stand for the proposition “that the trial court must explain the principles spelled out in CALJIC No. 8.73.” (*Rogers*, at p. 879.) Indeed, in *Mayfield* it had determined that “Because [CALJIC No. 8.73] as given was adequate [citation], and because defendant did not ask the trial court to clarify or amplify it, defendant may not complain on appeal that the instruction was ambiguous or incomplete.” (*Mayfield*, at pp. 778-779.)

Here, we note that defendant likewise failed to request that the trial court clarify or amplify CALCRIM No. 522, though he had plenty of opportunity to do so. Indeed, defendant specifically requested that the court give CALCRIM No. 522, arguing that

evidence of provocation had been adduced at trial. The People objected to the instruction. The court acquiesced to defendant's request.

CALCRIM No. 522, which is the analogue of CALJIC No. 8.73 (*Rogers, supra*, 39 Cal.4th at p. 878), states that "[p]rovocation may reduce a murder from first degree to second degree." It could be argued that CALCRIM No. 522 could provide a better explanation of the possible effect of provocation on the determination of the degree of a murder, it nevertheless adequately conveys the basic legal principle, particularly when read in conjunction with CALCRIM No. 521. If defendant felt that amplification was necessary, it was incumbent on him to request it. Moreover, defendant discussed in his closing statement how the jurors could find that evidence of provocation would negate the premeditation and deliberation required for a first degree murder conviction and, hence, enable them to find that he was instead guilty of a lesser offense.

Finally, there was simply not sufficient evidence of provocation such that any error in instructing the jury with the unmodified version of CALCRIM No. 522 could be deemed anything but harmless. Although Landeros testified that the victim made fun of defendant, called defendant a coward, and said there was nothing defendant could do about the items the victim had stolen from defendant, she never indicated when the victim purportedly made these statements. Thus, there was no evidence adduced at trial that defendant's shooting of the victim was committed in the immediacy of any ostensible provocation. Likewise, nothing in the defendant's reported statements that he feared the victim, and that the victim represented a threat to Landeros and her son, indicated any degree of immediacy. Rather, Landeros informed an investigator that

defendant “admitted to just basically cold-bloodedly shooting him. He made no indications that it was self-defense or that there was any sort of struggle that occurred, that there was any weapon [in the victim’s possession] out there.” Landeros testified that defendant told her the victim got into his truck without knowing what defendant wanted. When defendant shot the victim, the victim had no idea of what was coming.

Indeed, the evidence established that defendant brought a pistol with him when he took the victim out to a relatively remote area of Desert Hot Springs, where he fired five shots into the back of the victim. The forensic pathologist testified that the two wounds to the victim’s head were inflicted when the defendant was already prone; thus, “[t]hat would be consistent with [the victim] already being down and lying on the ground and then kind of a coup de grace, or execution style we sometimes call it, to make sure that the job was done, so to speak.” An investigator testified, “you have the scene that shows somebody shot from behind basically execution style” Thus, there was no evidence from which a reasonable jury could have concluded that defendant acted immediately in response to provocation when he murdered the victim.

B. CLERICAL CORRECTIONS

Defendant contends that several clerical errors in the sentencing minute order and abstract of judgment must be corrected. The People concede the errors. Specifically, defendant contends the abstract of judgment must be corrected to reflect that the trial court sentenced him to an *indeterminate* term of 25 years *to life* on the section 12022.53, subdivision (d) enhancement; that it must accurately reflect that defendant earned 124 days of additional credit for time served in a *mental health facility*, not as local conduct

credit; and that the sentencing minute order must be corrected to reflect that a restitution fine of \$10,000 pursuant to section 1202.4, subdivision (b) was imposed, rather than a probation revocation fine pursuant to section 1202.44.

Appellate courts have inherent power to correct clerical errors contained in abstracts of judgment that do not accurately reflect the judgment. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) Although we find all of defendant's requests for correction well taken, due to the limitations of the form itself it is not clear how to resolve the first two. While defendant was sentenced to a consecutive indeterminate term of 25 years to life on the section 12022.53, subdivision (d) enhancement, there is no space on the abstract of judgment form to indicate the indeterminate term. Likewise, while defendant earned 124 days of his presentence credit while in a mental facility, the abstract of judgment has no space for so indicating. Therefore, we shall direct the superior court clerk to make the corrections in any reasonable manner within the limitations of the form.

DISPOSITION

The trial court is directed to correct the sentencing minute order of January 28, 2009, to reflect that imposition of the \$10,000 restitution fine was pursuant to section 1202.4, subdivision (b), rather than a probation revocation fine pursuant to section 1202.44. The trial court is further directed to correct the abstract of judgment to reflect that defendant was sentenced to a consecutive indeterminate term of 25 years to life on the section 12022.53, subdivision (d) enhancement and that the separately noted 124 days of credit awarded defendant were actually earned by time spent in a mental facility, not as conduct credit. The trial court is directed to forward certified copies of the corrected

minute order and abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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/s/ MILLER
J.

We concur:

/s/ HOLLENHORST
Acting P. J.

/s/ McKINSTER
J.